

OHIO STATE JOURNAL ON DISPUTE RESOLUTION

VOLUME 21

2005

NUMBER 1

Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes

ROBERT C. BORDONE*

I. INTRODUCTION

Thirty years ago, Professor Frank E.A. Sander of Harvard Law School envisioned a “multi-door courthouse” that would allow parties to choose among a variety of dispute resolution forums.¹ Arguing that the prevailing “one-size-fits-all” litigation-centric approach to dispute resolution is often mismatched with the actual needs of many disputants, Sander proposed instead that lawyers and court officials first help parties analyze their disputes, then suggest appropriate forums to assist in facilitating resolution.² For many alternative dispute resolution (ADR) scholars, this speech marks the advent of the modern movement of alternative dispute resolution.³

* Thaddeus R. Beal Lecturer on Law, Harvard Law School and Deputy Director, Harvard Negotiation Research Project, Harvard Law School. A.B., Dartmouth College; J.D., Harvard Law School. I would like to thank the editors of the Ohio State Journal on Dispute Resolution for their invitation to participate in their 2005 Annual Symposium. Special thanks also to Florrie Darwin of Harvard Law School for her feedback and editorial assistance. Thanks also to my able research assistant Jennifer Reynolds for her excellent work.

¹ Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 111 (Apr. 7–9, 1976); Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

² Sander, *supra* note 1, at 112–13.

³ See Carrie Menkel-Meadow, *Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution*, in THE HANDBOOK OF DISPUTE RESOLUTION 13–31 (Michael L. Moffitt & Robert C. Bordone eds., 2005). See also Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 289 n.3 (2003) (noting that “Frank Sander’s speech . . . introducing the concept of the ‘multi-door courthouse’ has been identified by many as a key event in the birth of modern ADR”); Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2000 J. DISP. RESOL. 295, 298 n.11 (2000); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 1 (2000); Barbara McAdoo &

As a consequence of the increasing use of various and highly differentiated ADR processes, ADR scholars, ethicists, and practitioners have begun examining the appropriateness of lawyers' ethical rules as embodied in the Model Rules of Professional Conduct (MRPC).⁴ Of particular interest for many of these writers has been how to square the Model Rules' mandate for zealous advocacy with the imperative for cooperation, collaboration, and joint problem-solving that is often required of processes such as mediation or facilitated consensus-building.⁵ The fruit of this work has been the creation and adoption of new or supplementary ethical standards for mediators such as the AAA-ABA-ACR Model Standards of Conduct for Mediators,⁶ the American Academy of Family Mediators Ethics Codes,⁷ and the Uniform

Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL'Y 376, 376 n.3 (1997).

⁴ See, e.g., Joshua Isaacs, *A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833 (2005); Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475 (2005); Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. ON DISP. RESOL. 505, 508-09 (2003); Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935 (2001); Donald R. Lundberg, *The Amended Indiana Rules of Professional Conduct: Conflicts of Interest*, RES GESTAE, Dec. 2004, at 16; James M. Bowie, *Ethical Issues in Construction Mediation: Are There Any Rules?*, CONSTRUCTION LAWYER, Spring 2004, at 33; Jonathan R. Cohen, *When People are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739 (2001); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997); Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207 (2001).

⁵ See, e.g., Menkel-Meadow, *supra* note 4, at 427 ("[T]he zealous advocate will likely prove a failure in mediation, where creativity, focus on the opposing sides' interests, and a broadening, not narrowing of issues, may be more valued skills.").

⁶ See MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), available at <http://www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf> (last visited Oct. 17, 2005). The revised Model Standards of Conduct for Mediators were adopted by the American Bar Association's House of Delegates at their August 2005 meeting in Atlanta. It is the product of three years of work to revise the Model Standards passed in 1994. The revised Standards have been approved by the Dispute Resolution Section and the Litigation Section after hundreds of hours of work and various public forums in New York, California, Florida, and Texas.

⁷ See Note, *Model Standards of Practice for Family and Divorce Mediation*, 39 FAM. & CONCILIATION CTS. REV. 121, 127-34 (2001).

Mediation Act (UMA).⁸ Likewise, in arbitration, arbitrators subscribe to ethics rules promulgated by third-party credentialing organizations such as the American Arbitration Association or the National Arbitration Forum.⁹

Though separate ethics rules exist for lawyers who mediate or arbitrate, there continues to be no separate ethical rules for lawyers engaged in the process of negotiation.¹⁰ Instead, lawyers who negotiate simply subscribe to the MRPC, a set of rules designed with the litigation process in mind.

In this article, I argue that ethical rules should be determined by the particular *process* in which the lawyers are engaged and that these rules should be *mandatory*, not elective, for the particular process. In making this case, I will focus my analysis primarily on the role of the lawyer in the negotiation process. I distinguish my proposal from both those which advocate specific ethics rules based on context or type of practice¹¹ and those which permit or encourage a more free-market, contracts-based approach to legal ethics,¹² including models of collaborative law, a specific type of contracts-based approach to negotiation.

⁸ UNIFORM MEDIATION ACT (amended 2003), *available at* <http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm> (last visited Oct. 17, 2005).

⁹ See THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2003), *available at* <http://www.adr.org/sp.asp?id=21958> (last visited Oct. 17, 2005); NATIONAL ARBITRATION FORUM, NAF CODE OF CONDUCT FOR ARBITRATORS, *available at* <http://www.arb-forum.com/arbitrators/code-arbitrators.asp> (last visited Oct. 17, 2005).

¹⁰ *But see* ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS § 1 (2002), *available at* <http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf> (last visited Oct. 17, 2005). The ABA Section on Litigation created these guidelines to assist attorneys involved in settlement negotiations. Unlike the MRPC, these guidelines are entirely advisory and are not binding on practicing lawyers. For practice notes on this matter, see Steve Morris, Christina C. Stipp & Elizabeth Sorokac-Barnett, *Rules of Professional Conduct, Ethical Conflicts Facing Litigators, and Guidelines for Settlement Negotiations*, SJ035 ALI-ABA 1575 (2004).

¹¹ Fred C. Zacharias has written extensively on this topic. For an overview, see *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991); *Reform or Professional Responsibility As Usual: Whither the Institutions of Regulation and Discipline?*, 2003 U. ILL. L. REV. 1505 (2003); *Five Lessons for Practicing Law in the Interests of Justice*, 70 FORDHAM L. REV. 1939 (2002).

¹² See Peppet, *supra* note 4; see also Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 227, 275-85 (2003); Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 306 (1995) ("A lawyer is first and foremost an agent. A principal can generally structure a relationship with an agent along any lines the principal chooses, with the agent's consent."); Roy R. Anderson & Walter W. Steele, Jr., *Ethics and the Law of Contract Juxtaposed: A Jaundiced View of the Professional Responsibility Considerations in the Attorney-Client Relationship*, 4 GEO. J. LEGAL ETHICS 791 (1991); Paula A. Monopoli,

To make my argument, I first provide an overview of the emergence of “process pluralism” in the legal system over the past thirty years. I then articulate a theory of professional ethical codes, namely, that they exist primarily to enable the professional to better achieve her purposes in a particular activity, not to impede or limit or constrain her ability to behave. The idea of ethics codes as an *enabling* rather than a *constraining* force in professional life is largely lost in today’s lowest common denominator approach to legal ethics. Indeed, the various sets of ethical rules that exist for litigation, mediation, and arbitration are fundamentally designed to improve the way in which these various functions operate.

My focus then turns specifically to the ethics of negotiation. Unlike the other dispute resolution processes in which lawyers engage, each having its own particular ethical rules, negotiation continues to piggyback on the ethical guidelines used for litigation, namely, the MRPC.¹³ Applying the model I lay out for designing ethics codes earlier in the piece, I make the case that negotiation—like mediation, arbitration, and litigation—should have its own set of ethical guidelines, designed to further the particular set of purposes and goals that negotiation is best suited to achieve. In so doing, I reject arguments that would allow for the exercise of individual autonomy by lawyers or clients with respect to different approaches to and different ethical guidelines for negotiation.¹⁴ Instead, I contend that ethical guidelines for negotiation should be mandatory, just as they are for litigation, mediation, and arbitration. The article maintains that ethical rules for negotiators must help create the conditions between the parties that are most likely to facilitate a good outcome in negotiation (as opposed to a good outcome in mediation, litigation, or some other dispute resolution process). The article also recommends some of the basic principles that should guide the drafters of the new model rules for negotiation.

The article concludes by anticipating some of the philosophical or intellectual objections to my suggestions for a new approach to legal ethics. I address these concerns and attempt to offer responses to them. In addition, I also acknowledge some of the more practical barriers that would likely impede implementation of my reforms and offer some suggestions for managing them.

Drafting Attorneys as Fiduciaries: Fashioning an Optimal Ethical Rule for Conflicts of Interest, 66 U. PITT. L. REV. 411, 446 (2005) (“Fashioning an optimal ethical norm in the context of drafting[,] attorneys as fiduciaries must be informed by efficiency, fairness, and the complex nature of the attorney-client relationship.”).

¹³ MODEL RULES OF PROF. CONDUCT R. 4.1(a)–(b), R. 1.6, and R. 4.1 cmt. 2 (2003).

¹⁴ See, e.g., Peppet, *supra* note 4, at 510–11 (defending the “moral pluralism” of the legal profession and arguing that lawyers and their clients should have the autonomy to choose more traditional hard-bargaining and bluffing tactics in negotiation).

While this piece is not the first to propose a modification of ethical rules for negotiators,¹⁵ it is the first to suggest that the change should be both sweeping (i.e., not just a re-wording of Model Rule 4.1) and mandatory. It is also the first to argue that the perspective from which we should fashion our ethical rules should be the functional purpose of the process by which lawyers seek to achieve their goal. I contend that tailoring ethics to a specific legal specialization or around subjective claims of moral or cosmic “right” or “wrong” will lead to confusion and frustration. I also reject more recent arguments that would encourage or permit lawyers to contract privately for their own ethical rules.¹⁶

II. LAWYERING IN AN AGE OF PROCESS PLURALISM

In their 1994 piece, *Fitting the Forum to the Fuss*, Frank E.A. Sander and Stephen Goldberg posited that because each dispute resolution process has features that foster a somewhat different set of objectives, thoughtful lawyers and dispute resolvers should first diagnose the features of a dispute before prescribing the appropriate dispute resolution process.¹⁷ Far too many attorneys plunge headlong into litigation whenever a client comes to them with a problem. Some lawyers do this because they are either unaware of other process choices or lack the training and skills to avail themselves of them.¹⁸ A smaller number do it because the legal profession has morphed largely into a business and the pressure to generate large fees forces lawyers to recommend the most costly procedure for their clients, regardless of what might be appropriate.¹⁹ Whatever the reasons, a lawyer’s tendency to automatically pursue litigation as the solution to a client’s problems is akin to a cardiologist’s performing bypass surgery on every patient who walks through the door. No matter how successful heart surgeons may be in the operating room, they are more dangerous than helpful if they perform a

¹⁵ See generally Yarn, *supra* note 4, at 207; Brian C. Haussmann, *The ABA Ethical Guidelines for Settlement Negotiations: Exceeding the Limits of the Adversarial Ethic*, 89 CORNELL L. REV. 1218 (2004).

¹⁶ See, e.g., Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 674 (2001) (explicating and defending a contractarian approach to legal ethics).

¹⁷ Sander, *supra* note 1, at 127 (predicating different approaches to dispute resolution upon the relationship of the parties involved).

¹⁸ See generally Robert C. Bordone, Michael L. Moffitt & Frank E.A. Sander, *The Next Thirty Years: Directions and Challenges in Dispute Resolution*, in THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 3, at 507–22.

¹⁹ Cf. Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multidoor Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood*, 11 OHIO ST. J. ON DISP. RESOL. 297, 382 (1996).

triple-bypass on every patient regardless of the patient's symptoms or condition. For physicians, the ability to diagnosis an ailment before prescribing an appropriate remedy is critically important. Amazingly, however, most lawyers fail to diagnose the ailments of their clients before recommending litigation. By reflexively recommending litigation to every client, lawyers are essentially recommending the legal equivalent of open-heart surgery to every patient.

Since 1976, the number and variety of dispute resolution processes used by lawyers has expanded dramatically.²⁰ Litigation represents just one point on a broad continuum of dispute resolution processes ranging from negotiation to mediation, arbitration, and a menu of hybrid processes such as med-arb, early neutral evaluation, and the mini-trial.²¹

At the most general level, the primary objective of each dispute resolution process is to resolve disputes between individuals, organizations, or groups. However, a look below this obvious generic purpose reveals that each of these processes offers parties an approach to dispute resolution that is informed by different values and accomplishes different purposes.²²

In addition, how one defines a good outcome varies enormously depending on the process used to resolve the dispute.²³ Highly skilled mediators would be unlikely to claim that a dispute they mediated had a good outcome simply because the dispute was resolved quickly or went away. Instead, their assessment of a good outcome in mediation would take into consideration whether the mediators had upheld principles such as neutrality,

²⁰ See, e.g., Center for Public Resources, *The ABC's of ADR: A Dispute Resolution Glossary*, 13 ALTERNATIVES TO HIGH COST LITIG. 147 (1995) (listing and defining more than twenty public, private, and court-annexed ADR processes); see also STEPHEN GOLDBERG, FRANK SANDER, NANCY ROGERS & SARAH COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 4-6 (4th ed. 2003); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Reshaping Our Legal System*, 108 PENN ST. L. REV. 165 (2003).

²¹ See GOLDBERG, SANDER, ROGERS & COLE, *supra* note 20. See generally chapters in *Understanding Dispute Resolution Processes*, in THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 3, at 277-406.

²² See Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 97 (2002) (referencing Lon Fuller's claim that each kind of dispute resolution process—mediation, arbitration, consensus-building, etc.—has its own "morality" and individual functional analysis).

²³ See Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 10 (2004); see also Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, L. & CONTEMP. PROBS., Spring 2004, at 221 (arguing that courts should oversee development of dispute resolution design process in commercial arbitration to ensure fair outcomes for both parties).

informed consent, self-determination of the parties, voluntariness, and confidentiality,²⁴ since mediation is a process that values outcome determination by the parties and party autonomy.²⁵ Arbitrators, on the other hand, would measure success by criteria such as whether the parties ultimately comply with the arbitrators' decision, whether the decision saved the parties time and money, and whether the parties perceived the decision and the process as fair.²⁶ A good outcome in litigation might be defined by measuring whether justice was achieved, a right was vindicated, or appropriate reparations were made. Adjudication also provides third-party and assumedly more neutral decisionmaking that has the immediate legitimacy and credibility of enforcement by the state. From the perspective of parties embroiled in litigation, whether the resolution of a matter is "successful" can often be boiled down to a binary question of whether a particular litigant won or lost.²⁷

With the emergence of process pluralism in dispute resolution during the past thirty years, nearly every law school has recognized the importance of offering courses on mediation, negotiation, arbitration and other alternative dispute resolution (ADR) processes.²⁸ But more and more law schools are

²⁴ See CARRIE MENKEL-MEADOW, LELA P. LOVE, ANDREA K. SCHNEIDER & JEAN R. STERNLIGHT, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 325 (2005) (arguing that "mediation is successful if it accomplishes any of the following goals: giving disputing parties an enhanced understanding of their dispute and of each other's perspective, enabling parties to develop options responsive to issues raised by the dispute, and bringing closure to the dispute on terms that are mutually agreeable"). For an example of a more formal mediation assessment tool, see Nancy L. Hollett, Margaret S. Herrman, Dawn Goettler Eaker & Jerry Gale, *The Assessment of Mediation Outcome: The Development and Validation of an Evaluative Technique*, 23 JUST. SYS. J. 345 (2002).

²⁵ See MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 6; see also Michael H. Diamant, Elizabeth M. Zoller & Philip R. Bautista, *Strategies for Mediation, Arbitration and Other Forms of Dispute Resolution*, SK074 ALI-ABA 205 (2005); GOLDBERG, SANDER, ROGERS & COLE, *supra* note 20.

²⁶ See Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449 (2005); see also Douglas Yarn, *Foreword: An Introduction to Ethics in a World of Mandatory Arbitration*, 18 GA. ST. U. L. REV. 903 (2002); Diamant, Zoller & Bautista, *supra* note 24.

²⁷ See generally Jeffrey R. Seul, *Litigation as a Dispute Resolution Alternative*, in THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 3, at 336–57.

²⁸ See 2003 ABA DIRECTORY OF LAW SCHOOL DISPUTE RESOLUTION COURSES AND PROGRAMS, available at <http://www.law.uoregon.edu/aba/about.php> (last visited Oct. 17, 2005); see also Robert B. Moberly, *ADR in the Law School Curriculum: Opportunities and Challenges*, available at <http://www.conflict-resolution.net/articles/moberly.cfm> (last visited Oct. 17, 2005); Kay Elkins-Elliott & Frank Elliott, *Settlement Advocacy*, 11 TEX. WESLEYAN L. REV. 7 (2004).

also realizing that teaching law students how to mediate or arbitrate or litigate is not enough. Schools also need to teach their students how to diagnose the quality and nature of their clients' disputes in order to train them to prescribe the appropriate dispute resolution process. In short, lawyers are increasingly aware that they need to be equipped with tools of diagnosis, not just tools to perform surgery.²⁹ Demonstrating that not all disputes are alike and that litigation is not the only, the best, or even, at times, an appropriate, process for the management of many disputes, has been one of the most important contributions of the modern ADR movement to the legal profession.³⁰ Indeed, the idea that a dispute resolution forum or process should be tailored to meet the particular needs of the parties in the context of any given dispute has spawned a proliferation of processes and hybrids, from consensus building³¹ to various forms of mediation including facilitative, evaluative, and transformative.³²

III. THE ROLE OF PROFESSIONAL ETHICS

Professions articulate and adopt codes of ethics for many reasons.³³ At the most basic level, ethical rules govern, direct, and limit the conduct of the

²⁹ See, e.g., Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681,701 (2005) (stating that law students must be taught how to decide whether a particular dispute should be resolved through the filing of a lawsuit or through some other dispute resolution process and making the case for a much more integrated model of legal education).

³⁰ "Any discussion of recent developments in civil litigation must address the virtual revolution that has taken place regarding alternative dispute resolution (ADR)." Developments in the Law, *The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1851 (2000). "Attorneys have witnessed a steady growth in their clients' recourse to ADR in place of lawsuits, and ADR is increasingly incorporated into the litigation process itself—in the form of court-annexed arbitration, mediation, summary jury trials, early neutral evaluation, and judicial settlement conferences." *Id.* "'Alternative' models of dispute resolution have inarguably penetrated the mainstream; the relevant question now is how they will change it." *Id.* See also *supra* note 3.

³¹ See Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 30 (2002); Wang Wenying, *The Role of Conciliation in Resolving Disputes: A P.R.C. Perspective*, 20 OHIO ST. J. ON DISP. RESOL. 421 (2005); Menkel-Meadow, *supra* note 22, at 95.

³² Menkel-Meadow, *supra* note 23, at 24.

³³ See, e.g., Lorie M. Graham, *Aristotle's Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 J. LEGAL PROF. 5, 27–8 (1996) (providing a historical look at the development of ethics in the legal profession).

members of a profession.³⁴ Ethics can also be used to control competition, provide guidance to members of a profession, or help individuals distinguish right from wrong.³⁵ In the legal profession, the MRPC have come to be understood as setting the basic limits of appropriate behavior—a minimum or floor to which all members of the profession must adhere for membership in good standing within the profession.³⁶

Understanding ethics and ethical guidelines as limiting the set of appropriate or acceptable behaviors of a profession is certainly a workable way to give meaning to what it means to be an “ethical lawyer.” In some sense, the very nature of ethical rules is to set limits or constraints on what those bound to the rules may or may not do.³⁷ At the same time, thinking of ethics simply as demarcating the outer limits of acceptable behavior for a profession ends up being an essentially pessimistic and unhelpful way to envision the role that ethical rules can and ought to play in the professional life of attorneys in the 21st Century.

Instead of defining ethics in ways that simply constrain behavior, we might imagine that ethical codes ought to be conceived and crafted to serve as *facilitators* of particular kinds of behaviors, attitudes, and conditions that ennoble the professional activities and goals of a profession’s members. In this more constructively framed understanding of ethics, we analyze the appropriateness of a particular set of ethical norms not by highly subjective notions of what any one person or group might think of as right or wrong or morally good or bad. Nor do we develop ethical codes based on aspirational, high-minded notions of “zealous advocacy” that may sound noble but in fact provide little practical guidance to the attorney engaged in a host of dispute resolution processes, only some portion of which could even be considered true “advocacy” in the traditional sense of the term.

Instead, the approach to designing a code of ethics that I champion here is grounded in a much more functional analysis. Ethical rules should help create a professional environment in which practitioners are able to most

³⁴ Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399, 412 (2003).

³⁵ *Id.*

³⁶ See, e.g., Emily Olson, *The Ethics of Attorney Advertising: The Effects of Different State Regulatory Regimes*, 18 GEO. J. LEGAL ETHICS 1055, 1056 (2005) (examining how advertising affects the ideal of “the chained relationship of the lawyer to his clients, to his professional brethren and to the public”) (quoting the preface of the Model Rules).

³⁷ See David J. Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 444–45 (1990) (considering how some scholars describe rules as effectively engendering stable expectations).

competently, efficiently, and successfully produce the best possible result. In the case of the legal profession, ethical rules should foster optimal conditions between lawyers to achieve the goals of a particular form of representation, be it adjudication, mediation, arbitration, or some other activity.

In order to devise meaningful and truly enabling ethical codes using this functional standard, one must work backwards by initially seeking answers to several important, but basic questions: First, considering the particular activity for which one is to design ethical rules, what would constitute a successful outcome to this process or activity? Answering this question carefully—with specificity and nuance—matters if one is to succeed in developing an ethical code that will help the practitioner to achieve those goals more successfully.

With the answer to this question in mind, one must next consider, what conditions should exist to increase the likelihood that the parties will achieve this desired “good” or “successful” outcome as a result of engaging in this process? Again, the more specific and detailed an answer one can provide to this question, the more successful the drafters of the ethical code will be in promulgating a set of rules that are both implementable but also useful to the practitioner.

Finally, one must query, what kinds of behavioral or ethical norms will create and thereby facilitate a good outcome to the process? Using the answer to this question, the ethicist is now prepared to design rules that will be fitting to the forum or process being used.

Indeed, approaching the design and implementation of ethical codes with the notion that the ethical code should fit the purpose or function of the professional role in which the lawyers are to engage is a profoundly liberating and capacity-building way to develop such rules. Viewing an ethical code or set of rules as potentially *enabling* rather than *limiting* professional behavior turns traditional notions of ethics and ordinary ways of analyzing or talking about ethics on their head. Instead of asking questions that frame ethics as essentially constraining, such as “When is it legal to lie in negotiations?”³⁸ this approach embraces ethics as helpful tools that create an environment supportive of the process in which lawyers are engaged. The transformation of ethics from “impediment” or “barrier” to “tool” and “facilitator” is a profound and important one.

Ethical codes should not simply limit or constrain professional behavior, acting as some kind of floor below which one’s behavior is unacceptable; rather they should guide and facilitate the performance of the established

³⁸ See G. Richard Shell, *When Is It Legal to Lie in Negotiations?*, 32 SLOAN MGMT. REV. 93 (1991).

professional role.³⁹ Adopting an approach to ethics that puts professional competence and success ahead of subjective arguments about right, wrong, truth, or tradition puts into clearer perspective how we might think about the efficacy of a particular set of ethical rules for a given activity. It also frees us from the morass of debating divergent views of morality, values, and personal beliefs. With a functional approach, ethics are not about whose version of morality is more praiseworthy, but rather about what climate is most suited to ensuring that a particular job (whatever it may be) is done in the best possible way. The latter inquiry, as we will see below, lends itself to a much more objective and empirically verifiable set of guidelines to codifying ethics. This approach to ethical codes I call “process-enabling.”

IV. ADR AND PROCESS-ENABLING ETHICAL CODES

Since the widespread introduction of mediation, arbitration, consensus-building, and other ADR processes to the legal landscape during the 1970s and 80s, legal ethicists, ADR scholars, and practitioners have struggled to understand how the MRPC, an ethical code designed primarily with the adversarial process of litigation in mind, might work when lawyers engage in varying roles and in processes that differ enormously from the traditional litigation.⁴⁰ With respect to mediation and arbitration, the overwhelming consensus has been that the MRPC were ill-suited to the task of providing appropriate guidance to lawyers acting as third-party mediators or advocates in these processes.⁴¹ Though there has been less consensus on exactly *how*

³⁹ See Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 357 (2002).

⁴⁰ See Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 804 (1999) (asserting that the Model Rules provide little guidance to lawyers acting in alternative roles); Menkel-Meadow, *supra* note 22, at 66; see also *supra* note 4. See generally Pamela Phillips, *The Wisdom of Having a Representation Agreement—And What It Should Cover*, 824 PLI/PAT 749 (2005); Nancy A. Welsh & Bobbi McAdoo, *Eyes On the Prize: The Struggle for Professionalism*, DISP. RESOL. MAG., Spring 2005, at 13; Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427 (2000).

⁴¹ “Not surprisingly, the Model Rules as drafted provided little guidance to lawyers participating in ADR. Instead, they reflected the then dominant paradigm: lawyers are advocates in an adversarial system.” Fairman, *supra* note 4, at 508–09, citing Douglas H. Yarn, *supra* note 4, at 210–12 (footnotes omitted). See also Kovach, *supra* note 4; John Lande, *Possibilities for Collaborative Law: Ethics and Practice for Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1330–60 (2003); Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of*

the organized bar should rectify this situation,⁴² over time process-specific ethical codes have been promulgated for mediation⁴³ and for arbitration.⁴⁴ Each of these process-specific ethical codes represents attempts to govern behavioral norms or expectations that are more appropriate to the kind of process for which they were designed. That is, to at least some extent, the existence of separate ethical codes for mediators and arbitrators is an acknowledgement that the professional role of the attorney in these processes differs from the professional role of the attorney in traditional adjudication.⁴⁵ Consequently, the guidelines provide further clarification and direction for lawyers engaged in these processes.

Interestingly, even though negotiation is by far the most extensively used ADR process,⁴⁶ to date there has been no separate ethical code or rule set developed for lawyers engaged in the process of negotiation.⁴⁷ Indeed, only recently have legal academics and ethicists begun to even consider the question of whether the MRPC are fitting or appropriate ethical rules for negotiation.⁴⁸ This is not to say that little has been written about negotiation ethics. On the contrary, there is a vast literature on the subject.⁴⁹ But the vast

Law, 56 BAYLOR L. REV. 141 (2004); Isaacs, *supra* note 4, at 838-842; Menkel-Meadow, *supra* note 40, at 804; Menkel-Meadow, *supra* note 4, at 423. "[T]he great variety of roles and tasks taken on by third-party neutrals demonstrates the failure of the adversary model to provide standards of acceptable behavior in these areas." *Id.*

⁴² See, e.g., Peppet, *supra* note 4, at 504-14 (highlighting some major trends, critiques, and proposed solutions within the area of legal ethics).

⁴³ See MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 6.

⁴⁴ See THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 9.

⁴⁵ See Kovach, *supra* note 34, at 430. "The practice of law will continue to evolve and change . . . [A]ttorneys need to have guidance in all aspects of legal practice—the innovative as well as the more traditional." *Id.*

⁴⁶ See GOLDBERG, SANDER, ROGERS & COLE, *supra* note 20, at 17. "Negotiation—communication for the purpose of persuasion—is the preeminent mode of dispute resolution." *Id.*

⁴⁷ See Peppet, *supra* note 4 (arguing that the minimalist ethical standard for negotiation remains because the alternative is to "end the legal profession as we know it"). The ABA Section on Litigation did promulgate ethical guidelines for settlement in 2002, however. See ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS, *supra* note 10.

⁴⁸ See Menkel-Meadow, *supra* note 4, at 425. "Current legal ethics codes assume a clear distinction (based on our adversary system) between the advocates and the neutral, impartial and passive decision-maker who operates at arms-length from the parties." *Id.*

⁴⁹ See, e.g., Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990); Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or a Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761 (1990); Scott R. Peppet, *ADR Ethics*, 54 J. LEGAL EDUC. 72 (2004); CARRIE MENKEL-

majority of this focuses on various applications of the MRPC to the tension between disclosure, deception, and duties that lawyers have with respect to their role as officers of the court. Many of these articles focus narrowly on Model Rule 4.1, largely ignoring the fact that even though other rules do not address negotiation very specifically, the entire thrust of the rules breeds a climate between lawyers that undermines a problem-solving approach to negotiation.⁵⁰ Very little examination has been given to the fundamental question of whether the MRPC ought to even apply to lawyers engaged in negotiation.

While one may imagine a host of explanations for why there has been so little examination of whether the MRPC are the appropriate ethical guidelines for negotiation, I would suggest two of the primary reasons. First, many in the legal profession—even many scholars, practitioners, and proponents of ADR—simply do not consider negotiation as a process that is truly distinct from litigation.⁵¹ As a student of negotiation, and one who sees the tremendous possibilities of negotiation for resolving disputes, producing better outcomes for parties, and forging stronger relationships, I find the failure of many legal scholars, practitioners, and others to acknowledge the independent legitimacy of negotiation as a process choice deeply troubling and wrong-headed. Unlike arbitration and mediation, which clearly represent a track apart from the traditional litigation route, negotiation remains for

MEADOW & MICHAEL WHEELER, *WHAT'S FAIR: ETHICS FOR NEGOTIATORS* (2004); *DISPUTE RESOLUTION ETHICS—A COMPREHENSIVE GUIDE* (Phillis Bernard & Bryant G. Garth eds., 2002).

⁵⁰ See James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255, 269 (1999) (arguing that Model Rule 4.1 is inadequate to support the ethical needs of the “settlement culture”); see also Fairman, *supra* note 4, at 525 (“Model Rule 4.1 only prohibits false statements of fact. As applied to negotiation, the comments have been used to support an exception for ‘puffery’—a euphemism for lying.”) (internal footnotes omitted).

⁵¹ See Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 506 (1989). “[N]egotiation is neither a profession . . . nor a discrete activity with a defined mission . . . [but rather] a process that takes place in a multitude of contexts.” *Id.* That the legal community had long conceived of negotiation and litigation as inextricably linked is evident from a 1985 article in which Carrie Menkel-Meadow raises the possibility that one day lawyers might specialize in negotiation, separate from litigation. See Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 492 n.41 (1985), citing Roger Fisher, *What About Negotiation as a Specialty?*, 69 A.B.A. J. 1221 (1983). *Cf.* Charles Craver, *Negotiation Ethics: How to be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive*, 38 S. TEX. L. REV. 713 (1997) (asserting that most people do not think of “negotiation” as a typical ADR process even though it is, in fact, the most basic form of dispute resolution).

many nothing more than a component of the litigation process.⁵² To the degree that negotiation is simply considered as one part of litigation, akin to filing a complaint, submitting interrogatories, or conducting a deposition, it is unlikely that there will be any serious consideration of whether there ought to be separate ethical rules for negotiation.

Any serious scholar of negotiation understands, of course, that negotiation, properly understood, is a process entirely separate from litigation.⁵³ Its purposes, methods, and goals are distinct from the set of purposes, methods, and goals that litigators, mediators, or arbitrators might adopt.⁵⁴ Unless and until the legal academy accepts the legitimacy and integrity of the negotiation process as something entirely apart from litigation, it is unlikely that significant attention will be focused on whether the MRPC ought to apply to lawyers engaged in negotiation. And without a serious examination of this question and a corresponding reform effort, it is unlikely that lawyers will be able to consistently deliver outcomes for their clients that capitalize on the features of the negotiation process that allow for maximum value-creation for parties. My own view is that the clock is ticking on the legal profession to acknowledge this reality. The more reluctant lawyers are to embrace negotiation fully as a separate academic discipline and a separate process-choice for dispute resolution, the more the legal profession is likely to be supplanted by conflict management consultants, public policy analysts, businesspeople, and those from other related professions who have the skill-set and training to use negotiation as an independent problem-solving process to find integrating outcomes for their clients.

To be clear about my proposition, I do not contend that lawyers do not bargain or negotiate as a component part of the litigation process. Of course they do. Litigation typically involves negotiations over various procedural

⁵² Norton, *supra* note 51, at 506.

⁵³ See, e.g., MENKEL-MEADOW, LOVE, SCHNEIDER & STERNLIGHT, *supra* note 24 at xxxiv (identifying negotiation, mediation, and arbitration as dispute resolution processes separate from litigation); ALAN S. RAU, EDWARD F. SHERMAN & SCOTT R. PEPPET, *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* (3d ed. 2005); GOLDBERG, SANDER, ROGERS & COLE, *supra* note 20; see also Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 639 (1976). "[O]bservation suggests that . . . negotiation consists largely of the invocation, elaboration, and distinction of principles, rules, and precedents." *Id.*

⁵⁴ See Andrea K. Schneider, *Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes*, 5 HARV. NEGOT. L. REV. 113 (2000) (distinguishing negotiation from other ADR processes when determining how to resolve a particular dispute); see also John Lande, *Why a Good Faith Requirement is a Bad Idea for Mediation*, 23 ALTERNATIVES TO HIGH COST LITIG. 1, 9 (2005).

and scheduling matters, and in most adjudicatory processes there are times (or at least a time) when parties exchange offers and demands in an effort to settle the dispute. This exchange is called “negotiation,” and it is unarguably a component part of the larger litigation process that has been put in motion months or sometimes years earlier.

What I argue here, however, is that apart from the back-and-forth dance of demands and counter-offers that occurs during litigation, there also exists an entirely separate process of negotiation—one that is used both in dispute resolution and deal-making. This type of negotiation consists of a set of activities that is quite different from the stereotypical dance of concessions and haggling that many think of as “negotiation.” This separate process is the kind of negotiation that many have been teaching in law and business schools as well as in graduate programs in public policy for the past twenty-five years. Skillful attorneys with enlightened clients can choose this process before a complaint is filed. When they do, they engage in a series of communications—in a *process*—the purpose and goals of which typically include but are not limited to simply resolving the dispute at hand via a highly ritualized dance of concessions. Negotiation in this sense, then, is a process choice in the same way that mediation and arbitration are process choices.

A second reason that could explain why there have been few proposals for a separate process-enabling set of ethics for negotiation is simple: the MRPC are actually well suited to both litigation and negotiation. I have argued above that ethical rules ought to be designed in ways that facilitate or enable practitioners of a particular dispute resolution process to more effectively effectuate a good outcome as defined by the parameters or purpose of the process. That legal mediators and arbitrators have crafted their own sets of ethical rules while legal negotiators have not may simply be explained by the fact that the MRPC are doing an adequate job of supporting the conditions that allow for successful negotiation outcomes. In order to get an answer to this question, we need to better understand the goal of negotiation as an independent dispute resolution process.

V. DEFINING SUCCESS OR A GOOD OUTCOME IN NEGOTIATION

Ever since Roger Fisher, William Ury, and Bruce Patton wrote their groundbreaking book, *Getting to Yes: Negotiating Agreement Without Giving In*,⁵⁵ the fundamental understanding of what constitutes a good outcome in

⁵⁵ ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

negotiation has been changing.⁵⁶ Prior to the publication of *Getting to Yes*, most lawyers had a relatively simplistic understanding of success in negotiation.⁵⁷ For some, it may have involved simply resolving a dispute without having to go to trial.⁵⁸ For others, success may have meant getting a better deal than the other side, or claiming more value in the negotiation.⁵⁹ During the past twenty years, however, negotiation scholars have come to understand that a problem-solving or interest-based approach to negotiation lends itself to a much more sophisticated, nuanced, and advantageous conception of a good outcome.⁶⁰

While most negotiation instructors continue to expose their students to various competing models of negotiation, including competitive, adversarial, and zero-sum approaches, the vast majority of negotiation teaching and pedagogy identifies interest-based negotiation, the goal of which is to expand the size of the overall pie before dividing it, as a “best practice” in negotiation.⁶¹ While a number of formulas exist to measure success within a problem-solving, principled, or interest-based approach, it is fair to say that most of us who write and teach about legal negotiation would define a good outcome in a negotiation as one in which any agreement we reach: a) Is better than our best alternative to a negotiated agreement (BATNA); b)

⁵⁶ See, e.g., Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 OHIO ST. J. ON DISP. RESOL. 669, 693 (2003) (observing that GETTING TO YES has become a “beacon of enlightenment” for new generations of students and practitioners that moved negotiation pedagogy from mere description to prescription); see also Richard C. Reuben, *Harvard Conference Goes Back to Basics: Teaching of Negotiation*, DISP. RESOL. MAG., Winter 2000, at 32 (stating that GETTING TO YES helped to frame a generation of understanding about the field).

⁵⁷ FISHER, URY & PATTON, *supra* note 55, at xviii. “People . . . see two ways to negotiate: soft or hard. The soft negotiator wants to avoid personal conflict and so makes concessions readily in order to reach agreement. . . . The hard negotiator sees any situation as a contest of wills in which the side that takes the more extreme position and holds out longer fares better.” *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* See also ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 3 (2000) (arguing that “[t]he incentives to act combatively, selfishly, or inefficiently can be compelling”).

⁶⁰ See Bruce Patton, *Negotiation*, in *THE HANDBOOK OF DISPUTE RESOLUTION*, *supra* note 3, at 279–303.

⁶¹ See Robert C. Bordone & Robert H. Mnookin, *Negotiation Teaching in Law Schools*, in *NEGOTIATION PEDAGOGY: A RESEARCH SURVEY OF FOUR DISCIPLINES* (Program on Negotiation at Harvard Law School ed., 2000); see also PROGRAM ON NEGOTIATION AT HARVARD LAW SCHOOL CLEARINGHOUSE, *NEGOTIATION SYLLABUS COLLECTION*, available at http://www.pon.org/catalog/product_info.php?products_id=333 (last visited Oct. 17, 2005).

Meets our interests very well, the interests of the other side acceptably, and the interests of any third parties who may be affected by the agreement at least tolerably enough to be durable; c) Is the most efficient and value-creating of many possible sets of deal terms; d) Is based on a norm of fairness or some objective standard, criterion, or principle that is external to the parties themselves; e) Identifies commitments that are specific, realistic, and operational for both sides; f) Is premised on clear and efficient communication; and g) Improves or at least does not harm the relationship between the parties where "relationship" is defined as the ability of the parties to manage their differences well.⁶²

The above definition of a good outcome is one that is accepted to a large degree by virtually anyone who teaches and studies negotiation. At its core, it recognizes that, unlike the situation in litigation and arbitration, and even, to a certain extent, in mediation, the value-added of negotiation from a process perspective is the potential to use creativity and mutual information exchange to produce deals that actually enlarge the size of the pie for the parties.

Admittedly, many in the legal profession still might reject the notion that legal negotiation has a unique capacity to help parties create value when conducted properly, and that any definition of success for negotiation must therefore be measured simply by whether the final result did, in fact, claim the most value available from a fixed pie.⁶³ While these people are free to defend older, more traditional notions of negotiation as nothing more than a dance of concessions and a battle of wills, the overwhelming majority of negotiation scholars and practitioners recommend that lawyers adopt an integrative or value-creating approach to negotiation.⁶⁴ For these reasons, I argue that the definition of a good outcome for negotiation outlined above reasonably encapsulates the overwhelming view of most legal and negotiation scholars. Those who would continue to disagree with this,⁶⁵

⁶² See Patton, *supra* note 60; See also Roger Fisher, *A Code of Negotiation Practices for Lawyers*, 1 NEGOT. J. 105, 107-08 (1985).

⁶³ See, e.g., Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369 (1996); Peter Robinson, *Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 963, 966 (1998) (pointing out that when negotiators assume a zero-sum game, they are compelled to behave competitively); Charles A. Goldstein & Sarah L. Weber, *The Art of Negotiating*, 37 N.Y.L. SCH. L. REV. 325, 338 (1992). "[A]lthough you should take pains to understand the objectives of your opponent, whether or not your opponent has achieved, or failed to achieve, his or her objectives is immaterial if you have achieved yours." *Id.*

⁶⁴ See, e.g., Wetlaufer, *supra* note 63, at 369 n.1 (citing a long list of negotiation scholars who recommend an integrative approach to bargaining).

⁶⁵ I acknowledge that there continue to be a small number of law school negotiation teachers who continue to teach students that deception and value claiming are most

while free to hold their opinions, are part of an ever-shrinking minority of those who continue to teach “tricks and tips” as the preferred approach to legal negotiations.

VI. CONDITIONS NECESSARY TO FACILITATE A GOOD OUTCOME IN THE NEGOTIATION PROCESS

Stipulating for now that my definition of a good outcome is a fair and reasonable one that is widely taught, I review the circumstances or conditions necessary to help parties in negotiation arrive at such a good outcome. Thanks to the empirical work of colleagues in game theory, social and cognitive psychology, behavioral economics, and other related disciplines, a bounty of scholarship produced during the last thirty years provides evidence of what conditions best facilitate integrating outcomes in negotiation.⁶⁶

For example, we know that mutual information exchange enables parties to identify value-creating trades, areas in which they can exploit differences between them to enlarge the size of the overall pie. Indeed, Howard Raiffa, in a series of famous lectures he delivered at Harvard, posited that maximum overall value creation occurs under conditions of FOTE: Full, Open, Truthful Exchange.⁶⁷ While one-hundred percent FOTE rarely, if ever, occurs in negotiation because of concerns regarding the division of the pie,⁶⁸ it is nonetheless true that the more comfortable the parties feel divulging

important in negotiation. See, e.g., Craver, *supra* note 51, at 715–24; Michael Meltsner & Philip Schrag, *Negotiating Tactics for Legal Services Lawyers*, in WHAT’S FAIR: ETHICS FOR NEGOTIATORS 205–11 (Carrie Menkel-Meadow & Michael Wheeler eds., 2004); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, in WHAT’S FAIR: ETHICS FOR NEGOTIATORS 91–107 (Carrie Menkel-Meadow & Michael Wheeler eds., 2004) (asserting that deceptive and misleading an opponent about one’s true position is a necessary part of all negotiation).

⁶⁶ See, e.g., MAX H. BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING 134–51 (2002); ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 136–70 (3d ed. 1993); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982); LEIGH L. THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR 9–31 (2d ed. 2001); Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109 (1997); Herbert C. Kelman, *The Interactive Problem-Solving Approach*, in MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT 501–19 (Chester A. Crocker, Fen O. Hampson & Pamela Aall eds., 1996).

⁶⁷ HOWARD RAIFFA, LECTURES ON NEGOTIATION ANALYSIS 6 (1996); see also RAIFFA, *supra* note 66, at 306 (pointing out that the subjects in a particular simulation “who did best empirically were the ones who simply announced the truth—the ones who did not misrepresent”) (emphasis in original).

⁶⁸ See MNOOKIN ET AL., *supra* note 59, at 17.

information about their true interests and preferences, the more likely it is that value will be created.⁶⁹

We also know that negotiators who have high mutual trust⁷⁰ between them are more likely to share information between them and more able to brainstorm creatively to facilitate a good outcome.⁷¹

Other factors that increase the likelihood of parties obtaining a value-maximizing, Pareto-optimal outcome in negotiation include engaging in informal small talk and communication,⁷² increased listening,⁷³ especially increased use of open-ended questioning by both sides, and the adoption of a more relational approach.⁷⁴ We also know that parties who have been trained in interest-based bargaining are more likely to find value-creating trades than those who have not,⁷⁵ and that parties who have been exposed to various

⁶⁹ Cf. *id.* at 207 (discussing how creating a collaborative working relationship with the lawyer on the other side and promoting effective communication can promote problem-solving).

⁷⁰ Matthew A. Cronin & Laurie R. Weingart, *The Differential Roles of Respect and Trust on Negotiation*, IACM 18th Annual Conference (2005), available at <http://ssrn.com/abstract=726183> (last visited Oct. 17, 2005). In this case, I define trust as the willingness to be vulnerable to another person in the absence of monitoring.

⁷¹ See THOMPSON, *supra* note 66, at 109–36.

⁷² See, e.g., Kathleen L. McGinn, Leigh Thompson & Max H. Bazerman, *Dyadic Processes of Disclosure and Reciprocity in Bargaining with Communication*, 16 J. BEHAV. DECISION MAKING 17, 19 (2003) (citing a host of empirical studies that indicate that parties who engage in communication produce more efficient outcomes than those who are not permitted to do so); Kathleen Valley, Leigh Thompson, Robert Gibbons & Max H. Bazerman, *How Communication Improves Efficiency in Bargaining Games*, 38 GAMES & ECON. BEHAV. 127, 150 (2002); see also Robert M. Bastress & Joseph D. Harbaugh, *Taking the Lawyer's Craft into Virtual Space: Computer-Mediated Interviewing, Counseling, and Negotiating*, 10 CLINICAL L. REV. 115, 142 (2003) (noting that “[i]nformal CMC ‘chat’ (the online version of ‘small talk’) has been found to promote good working relationships, just as it does in . . . [face-to-face] relations”).

⁷³ See Neil Rackham & John Carlisle, *The Effective Negotiator-Part 1: The Behavior of Successful Negotiators*, Vol. 2, No. 6, J. OF EUR. INDUS. TRAINING 6 (1978); Neil Rackham & John Carlisle, *The Effective Negotiator-Part 2: The Behavior of Successful Negotiators*, Vol. 2, No. 7, J. OF EUR. INDUS. TRAINING 2 (1978) (showing how more successful negotiators tended to reflect back the concerns of others, test understanding, and seek information by asking questions more often than those who are just average negotiators).

⁷⁴ See David A. Binder, Paul Bergman & Susan C. Price, *Lawyers as Counselors*, in ALTERNATIVE DISPUTE RESOLUTION: STRATEGIES FOR LAW AND BUSINESS 51-67 (E. Wendy Trachte-Huber & Stephen K. Huber eds., 1996).

⁷⁵ See MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 112 (1992) (describing a study where managers who trained in integrative negotiation

cognitive and psychological biases such as self-serving bias, overconfidence bias, and the fundamental attribution error are less likely to fall victim to these biases and therefore more likely to succeed at reaching a mutually acceptable outcome.⁷⁶

VII. DO THE MRPC CREATE CONDITIONS TO ENABLE OR FACILITATE A GOOD OUTCOME IN NEGOTIATION?

With the knowledge that negotiators are most likely to achieve a successful outcome under conditions where trust is high, relationships are strong, information about preferences is shared reciprocally, and parties are encouraged to brainstorm rather than be constrained by their own partisan perceptions of possibilities, we can ask whether the MRPC help to create these conditions in negotiation.

The only rule that addresses legal negotiation specifically is Model Rule 4.1. It states,

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.⁷⁷

On its face, this rule does not encourage the free flow of information between the parties. Nor does it necessarily discourage that free flow of information unless such information exchange would violate the provisions relating to client confidentiality found in Model Rule 1.6.

However, Comment 2 to Model Rule 4.1 eviscerates much of the ostensibly neutral thrust of the rule by stating:

Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this

practices outperformed negotiators who had lots of experience but no training in integrative techniques).

⁷⁶ See Max H. Bazerman & Katie Shonk, *The Decision Perspective to Negotiation*, in THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 3, at 53.

⁷⁷ MODEL RULES OF PROF. CONDUCT R. 4.1 (2004).

category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.⁷⁸

With respect to negotiation, then, Comment 2 undercuts the spirit, if not the letter, of the rule itself, stripping it of virtually any meaning except to proscribe bald-faced material lies. As Gary Tobias Lowenthal writes, under the MRPC the ABA has “unambiguously embraced ‘New York hardball’ as the official standard of practice.”⁷⁹ In short, the Model Rules allow attorneys to misrepresent their client’s bottom line reservation price as well as their general intentions during negotiation without any risk of violating an ethical norm.⁸⁰

Moreover, Model Rule 1.6, which deals with client confidentiality, prohibits an attorney from disclosing information relating to representation without the client’s consent unless the lawyer believes that revealing the information is necessary to prevent certain death or substantial bodily harm, or to rectify a narrow range of crimes or fraud by the client.⁸¹ Interpreted in tandem, Model Rules 4.1 and 1.6 create conditions that permit lawyers to engage in hard bargaining tactics that are misleading and deceptive without risk of official sanction.⁸²

Indeed, commentators who have examined the Model Rules with respect to their appropriateness for problem-solving negotiation agree that, rather than helping to create the conditions that enable or facilitate a good outcome in negotiation, the rules tend to do just the opposite: they tend to encourage dissembling behavior that borders on lying, inviting distrust, bluffing, and puffery into the negotiation process.⁸³ Because the Model Rules were drafted

⁷⁸ MODEL RULES OF PROF. CONDUCT R. 4.1, cmt. 2 (2004).

⁷⁹ Gary Tobias Lowenthal, *The Bar’s Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411, 445 (1988).

⁸⁰ See Peppet, *supra* note 4, at 498, 499 n.85; see also Craver, *supra* note 51, at 715.

⁸¹ See MODEL RULES OF PROF. CONDUCT R. 1.6(a)–(b) (2004).

⁸² See Peppet, *supra* note 4, at 499; Craver, *supra* note 51, at 715.

⁸³ See Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 74 (1994) (arguing that “good reasons weigh against using the Model Rule’s preliminary approach to exclude some conduct from the definition of deception”); see also James J. Alfani, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation?”*, 19 FLA. ST. U. L. REV. 47 (1991); Steven C. Krane, *Ethics 2000: What Might Have Been*, 19 N. ILL. U. L. REV. 323, 327–28 (1999) (as worded, the Model Rules enable and perhaps encourage lawyers to “practice at the margins of propriety”); Kovach, *supra* note 4, at 948 (noting that the “ethical rules that currently govern lawyers were written with the adversary system in mind. The underpinnings of the adversary system, with a focus on competition and winning at all costs, provide the context for the lawyer’s work”).

with the profoundly adversarial process of litigation in mind,⁸⁴ their entire thrust presumes adversarialism rather than cooperation. Given the goals of litigation as a process designed to persuade a third party of the truth or falsity of a certain set of events or allegations, promulgating rules that encourage sharp adversarialism and that set limits on aggressive behavior may well make sense.

However, the goals of negotiation are substantially different from those of litigation. In light of this, it is hardly surprising that the ethical rules designed to facilitate a good outcome in litigation would be ill-suited to the negotiation context. Ethical guidelines are not one-size-fits-all.⁸⁵ To the degree that ethical guidelines are designed to facilitate or enable parties to do their best in a particular activity, they must be geared with the activity in mind. It is perfectly appropriate behavior for spectators at a baseball game to carry on private conversations, join in the “wave,” eat, drink, and cheer loudly while the game is in play. Behavior such as this that might be distracting in another context does not adversely affect the quality of play on the field. One would not, however, apply the norm of behavior for baseball spectators to golf spectators on the theory that both baseball and golf are sports. Because of the concentration required of a professional golf player, were spectators to carry on independent conversations, do the “wave,” or shout and cheer it would impede the golfer’s ability to play the best possible game. Consequently, the behavioral norms for each sport have evolved to optimize the quality of play—the quality of the outcome for the sport.

As it now stands, unfortunately, the ethical guidelines that apply to negotiation are wholly inapt. Though changes in legal education during the past twenty-five years have put interest-based, problem-solving negotiation firmly on the map,⁸⁶ educators and leaders in the legal profession have done little to change the ethical guidelines—that is, the behavioral norms and expectations—that young lawyers will face once they enter the profession. This would be like spending thousands of dollars on golf lessons for a child, throwing that child on a course where spectators are howling, cheering, and drinking beer, and then wondering why the child is not playing golf the way she was taught to play. If negotiation as a process is to achieve its full potential—that is, if lawyers are to be able to capitalize on the promise of

⁸⁴ See Kovach, *supra* note 34, at 405.

⁸⁵ See Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1161 (1995) (arguing that ethics rules need to be re-crafted to take account of new forms of representation by lawyers).

⁸⁶ See MENKEL-MEADOW ET AL., *supra* note 24, at xxxv (discussing how the study of negotiation, mediation, and other problem-solving processes became institutionalized in American legal education in the thirty years since the Pound Conference of 1976).

negotiation as a process independent of litigation—then the bar must make serious efforts to reform the ethical code under which legal negotiators must act.

I would like to distinguish my argument here from some of those criticizing the Model Rules in the context of ADR for their emphasis on the lawyer's duty of zealous representation.⁸⁷ In my view, the duty of zealous advocacy is not the problem. Whether a lawyer is representing a client in mediation, arbitration, litigation, or negotiation, a goal of zealous advocacy in the interest of the client is laudable. We need not back away from this in any re-design of ethics rules for negotiators. The problem is not zealous advocacy, but rather what zealous advocacy might mean in the context of each individual dispute resolution process. In litigation, zealous advocacy means winning an argument by persuading a third party (a jury or judge) that your version of events or your understanding of the law is true or correct. On the other hand, in negotiation, zealous advocacy entails identifying the underlying interests of the client and then employing one's skills of listening, creativity, and joint problem-solving to best meet those interests and attain a satisfying and efficient outcome.⁸⁸ The problem is not the norm of zealous advocacy but rather that the Model Rules themselves, taken as a whole, treat zealous advocacy as an aspect of an adversarial battle. Rule 4.1 only exacerbates this tendency. Whereas this may be effective in the fundamentally adversarial context of litigation, applying this same template to negotiation tends to foster clumsy agreements, leave potential value left unrealized, and produce unnecessary impasse.

⁸⁷ Kovach, *supra* note 4, at 949.

The demands of law practices today seem to compel even more extreme behavior, all of which is employed in the name of zealous representation. Even the profession itself realizes that constant conduct in a contentious and litigious manner takes it toll. Lawyers report increased pressure in a ferociously competitive marketplace and complain about having to work in an adversarial environment 'in which aggression, selfishness, hostility, suspiciousness, and cynicism are widespread.

Id.; see also Fairman, *supra* note 4, at 520–22 (outlining the debate between those who believe that zeal is appropriate for ADR and those who do not); Menkel-Meadow, *supra* note 4, at 427.

⁸⁸ See, e.g., Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 291–97 (1999).

VIII. TOWARD A NEW ETHICS OF LEGAL NEGOTIATION

This Article is not the first to posit that the ethical guidelines provided for in the MRPC and the behavioral expectations of the problem-solving lawyer are not well-aligned with the behavioral expectations of the problem-solving lawyer.⁸⁹ Recognizing that the adversarial bent of the MRPC makes problem-solving negotiation an even more difficult task for lawyers than for other professionals not bound by such ethical guidelines, academics have proposed a number of ways that attorneys might be able to achieve a good outcome in negotiation despite the unhelpful “noise” created by ethical norms that result in conditions hostile to value creation and collaborative negotiating.

Leveraging the fact that lawyers often negotiate with each other repeatedly and, as a result, tend to gain reputations either as collaborating problem-solvers or as difficult bargainers, Ronald Gilson and Robert Mnookin have suggested that individual lawyers might consider creating more robust reputational markets for problem-solving. By so doing, they could signal to potential clients that those who have a desire to use negotiation as a way to create value might consider hiring them for their collaborative reputation.⁹⁰

More formal proposals outside the creation and use of reputational markets typically adopt some kind of contracts-based approach to negotiation ethics. Chief among the proponents of these have been members of the growing collaborative law movement, which operates especially in family law, though is now expanding to other contexts as well.⁹¹ The idea behind collaborative lawyering is simple. Lawyers involved in collaborative law associations in a particular state all receive mandatory training in interest-based, problem-solving negotiation. In addition, they often agree to abide by a modified set of ethical rules that are specific to the state in which they are practicing.⁹² These ethical rules typically include duties of candor, good

⁸⁹ See *supra* notes 40–41.

⁹⁰ See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 525–27 (1994).

⁹¹ Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL’Y & L. 967 (1999); see also James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431 (2002); Sheila M. Gutterman et al., *Collaborative Law: A New Model for Dispute Resolution*, COLO. LAWYER, Dec. 2004, at 59; Lande, *supra* note 41.

⁹² See TEX. FAM. CODE ANN. § 6.603 (2001) (Texas was the first state to formally sanction the use of collaborative law in its statutory code); see, e.g., PRINCIPLES OF COLLABORATIVE LAW (Collab. Law Inst. of Ga.), available at

faith, and fair play as well as provisions that shift the norms away from haggling and dissembling and toward more productive information exchange and brainstorming. Collaborative lawyers and the parties who hire them agree that the collaborative attorneys will serve their clients only during negotiation.⁹³ Should the clients decide to change processes and move toward litigation, the collaborative lawyers withdraw from representation and the clients agree to hire other lawyers for the litigation stage.⁹⁴ The idea behind collaborative lawyering is that the commitment of both lawyers and clients on all sides to withdraw from representation if the negotiation fails signals the intention of both sides to participate in the negotiation process in a spirit of cooperation and good faith. It signals to each side that the other will be more forthcoming with information about their interests and more trusting in their interactions with each other. Because lawyers involved in the collaborative lawyering movement have been trained in interest-based bargaining, they are also aware of how to create value in negotiation. Hence, the private ordering involved here separates the negotiation process cleanly from the litigation process and the modified set of ethical rules involved in collaborative lawyering helps create the conditions necessary to achieve a good outcome.⁹⁵

In a growing number of cases, Collaborate Law Participation Agreements (CLPAs) create contracts that require honest disclosure. For example, Collaborative Lawyers in Arizona agree that the parties will “give full, honest, and open disclosure of all information, whether requested or not.”⁹⁶ Cincinnati’s CLPA states that participation in the collaborative law process is “based upon the assumption that both parties have acted in good faith and have provided complete and accurate information to the best of their ability.”⁹⁷

Collaborative law and other private contracting between lawyers for ethical rules more suited to negotiation are gaining in popularity, signaling the growing acknowledgement that negotiation has tremendous promise and capacity to create value for clients when lawyers can find ways to increase trust, cooperation, and truthful information exchange.

<http://www.collaborativelawga.com/principles.html> (last visited Oct. 17, 2005); PRINCIPLES AND GUIDELINES FOR THE PRACTICE OF COLLABORATIVE LAW, *available at* <http://www.mediate.com/articles/collabpg.cfm> (last visited Oct. 17, 2005).

⁹³ Lawrence, *supra* note 91, at 432.

⁹⁴ *Id.*

⁹⁵ See *supra* Part VI.

⁹⁶ See Peppet, *supra* note 4, at 492 n.59.

⁹⁷ *Id.* at 493 n.62.

However, because collaborative law is essentially a private contract still subject to the supervening ethical norms and expectations of the legal profession, problems exist with this approach to negotiation. For example, there is much debate about whether lawyers can ethically "recuse" themselves from the prevailing MRPC that govern all lawyer behavior.⁹⁸ Secondly, enforceability of these contracts remains an open and unanswered question.⁹⁹ Questions of enforceability arise at two levels: (1) are these agreements legally enforceable in court at all?¹⁰⁰ and (2) if they are, what is the reasonable likelihood that an individual attorney will bring suit against another attorney to enforce these rules given the cost such plaintiff attorney would need to incur to enforce the contract? Finally, some have expressed concern about how attorneys' duty of zealous advocacy squares with mutual commitments of collaborative law attorneys not to pursue litigation if settlement fails.¹⁰¹

A third way that some academics have tried to address the problem of ethics rules not matching up with the realities of practice has been to call for individualized ethical rules for particular practice areas.¹⁰² This context-

⁹⁸ See Spain, *supra* note 41, at 153.

[T]he practice of collaborative law seems to place an attorney somewhere on the continuum of a lawyer acting in a neutral, non-representational capacity as a mediator and a lawyer acting in a representative capacity zealously representing their client's interests. This may be a particularly difficult role for a collaborative lawyer to balance.

Id. (internal footnotes omitted); see also Isaacs, *supra* note 4, at 842 (noting that collaborative law has not resolved its ethical questions and requires attention and internal solutions from practitioners).

⁹⁹ See Peppet, *supra* note 4, at 479.

¹⁰⁰ *Id.* at 513-14.

¹⁰¹ See Lande, *supra* note 41, at 1331 (arguing that the mandatory withdrawal provisions in collaborative law agreements do not violate the duty of zealous advocacy).

¹⁰² See Jeffrey N. Pennell, *Ethics in Estate Planning and Fiduciary Administration: The Inadequacy of the Model Rules and the Model Code*, 45 RECORD 715, 763 (1990) (suggesting an ethics code designed for estate planners); Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149, 150-52 (1993) (recommending the creation of separate ethics codes for corporate and securities practice); Fred C. Zacharias, *Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?*, 6 GEO. J. LEGAL ETHICS 903, 930-31 (1993) (suggesting that the American Law Institute consider drafting specialized ethical codes); cf. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 515 (1990). As Wilkins explains:

[W]e must abandon the traditional model's commitment to general, universally applicable ethical rules. General limitations on zealous advocacy purporting to bind all lawyers in all contexts create only the illusion of controlling lawyer discretion

based approach to ethics has been heralded for a whole range of specialties from family law to real estate to bankruptcy to criminal law.¹⁰³ Practice-area or context-specific ethics codes have the advantage of allowing increased tailoring to the intricacies of the law within a certain context. However, this approach also poses a range of problems. First among them is that introducing context-specific ethics codes might spawn literally dozens of ethical codes, creating a mass of confusion for clients, lawyers, and the profession. Secondly, such a solution would give rise to an entirely new area of law, one we might call, "conflict of ethics." Figuring out which ethics rules might apply in a case that involved bankruptcy, a divorce, and real estate issues would be no easy task. Would the parties in such a case negotiate to determine which ethical rules they would follow? Would there be a multi-practice set of ethical rules that tried to split the difference? Or would there be a hierarchy of ethical rules? The morass such an approach might create would lead to more problems than the ill-fitting unitary system we already have.

Recently, Professor Scott Peppet proposed a fourth approach to the problem of ethics with respect to legal negotiation in the *Iowa Law Review*. The quandary his proposal addresses relates to what he calls the "Collaborator's Sorting Problem."¹⁰⁴ That is, well-trained lawyers who may want to negotiate in a collaborative and problem-solving way may feel constrained from doing so because they cannot distinguish, at first glance, other lawyers like themselves from those who may adopt a more hard-headed, zero-sum bargaining style. Peppet's piece analyzes the various ways in which academics and practitioners have sought to address this sorting problem, including Gilson and Mnookin's proposal to develop reputational markets and others' various models for collaborative law and contract-based approaches. He finds all of these to fall short of their aspiration.¹⁰⁵

In their stead, Peppet proposes what he calls a contract model of legal ethics.¹⁰⁶ Peppet's model responds to the shortcomings of Gilson/Mnookin's

because they ignore the extent to which that discretion is inevitably reintroduced in interpretation and application.

Id. (citing Marc S. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 147 (1974)).

¹⁰³ See, e.g., Bruce A. Green & Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281, 1296 (1996); Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45 (1998); Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687 (1991).

¹⁰⁴ See Peppet, *supra* note 4, 481-484.

¹⁰⁵ *Id.* at 485.

¹⁰⁶ *Id.* at 514.

reputational approach as well as to the shortcomings of collaborative lawyering with respect to various ethical questions and enforceability issues. Under Peppet's proposal, lawyers would be permitted to enter into contracts for collaboration that would "explicitly trigger public disciplinary sanctions in the event of breach."¹⁰⁷ However, in order to ensure enforcement of these standards by the bar, lawyers would be limited in their ability to contract. They would need to choose one of several sets of pre-determined ethical rules made available to them by the bar.¹⁰⁸ According to Peppet, such an approach would preserve what he calls "moral pluralism" in the profession, or the idea that lawyers are unlikely to agree upon the appropriate limits of deception in negotiation or the best way to approach legal negotiation in terms of misrepresentation, bluffing, and the like.¹⁰⁹ Given the wide range of views on this issue, it would be futile in Peppet's view, to impose some kind of normative approach on lawyers. At the same time, however, by limiting the number of ethical regimes lawyers can choose from to a montage of bar-approved options, Peppet's contracts approach preserves the advantages that a centralized, reliable, and predictable ethics code provides as well as the advantages that a uniform regulatory approach gives toward structuring and containing a profession.¹¹⁰

Peppet's proposal is bold, nuanced, and well-articulated. Helpfully, he explains his proposal by revealing the assumptions and reasoning upon which he bases his contractarian model. His goal is to strike a balance between those who would prefer a more discretionary approach to legal ethics, one that stresses the autonomy of clients and lawyers and—what he considers to be the inevitable "moral pluralism" of the profession—those who favor a uniform approach to legal ethics on the ground that ethical guidelines provide structure and guidance to lawyers that they need to make their ethical decisions easier and more certain. Peppet's proposal addresses the concerns represented by these various viewpoints and does so, in my view, exceedingly well, given the assumptions upon which it is based.

IX. THE CASE FOR A PROCESS-ENABLING ETHICAL CODE IN NEGOTIATION

Peppet's call for a contractarian model endeavors to address the collaborator's sorting problem. In crafting my proposal for a process-enabling ethical code for negotiation, I adopt a somewhat different set of

¹⁰⁷ *Id.* at 514.

¹⁰⁸ *Id.* at 518.

¹⁰⁹ *Id.* at 510.

¹¹⁰ *Id.* at 519.

assumptions and, in so doing, address a related, but different problem. The call for an ethical code for lawyers that is tailored to the process of negotiation and mandatory with respect to negotiation therefore differs considerably from that offered by Peppet but is at least as sweeping and foundational in its scope. Indeed, it swallows Peppet's solution by obviating his problem: under my proposal, all lawyers acting as negotiators would necessarily be collaborators. Under my proposal, failure to negotiate with a collaborative approach would constitute a violation of the ethical rules of legal negotiation.

My proposal is simple: Given that the common understanding of success or a good outcome in negotiation has evolved during the past thirty years thanks to the research of those in other academic disciplines, such as social and cognitive psychology and behavioral economics,¹¹¹ lawyers must update the ethical code for negotiation so that it maximizes the likelihood of creating conditions between the lawyers for them to achieve this good outcome.

In light of this reality, the ABA should promulgate a new Model Rules of Professional Conduct for Lawyers in Negotiation (MRPCN) that would be mandatory for all practicing lawyers and that would differ enormously from the MRPC already in use. The current rules would be re-named the Model Rules of Professional Conduct for Litigation (MRPCL). As part of this reform effort, the ABA's new Model Standards of Conduct for Mediators would be re-named the Model Rules of Professional Conduct for Lawyers in Mediation (MRPCM) and the ABA would promulgate a set of binding Model Rules of Professional Conduct for Lawyers in Arbitration (MRPCA).

By promulgating mandatory Model Rules of Professional Conduct that are specific to the process used by the lawyer in a particular case, the ABA can best ensure that each set of ethics—that is, each set of behavioral norms and expectations—is tailored to help lawyers leverage the peculiarities of the process to achieve the desired or normative outcome of the particular process being chosen. That is, golfers will be able to play golf with the assurance that the audience will be quiet and respectful; baseball players will play knowing that they have the loud and enthusiastic support of their fans in the stands. Most importantly, spectators will have clarity as to what behaviors are appropriate in each forum.

A process-specific approach to legal ethics obviates the legitimate concerns of those who critique collaborative law and wonder whether the norms necessary for collaborative lawyering somehow violate the current ethical requirements of the MRPC.¹¹² A process-specific approach to ethics also eliminates the concerns of those who wonder about the practicality of

¹¹¹ See *supra* notes 66–76.

¹¹² See, e.g., Isaacs, *supra* note 4.

context-specific legal ethics.¹¹³ Instead of spawning literally dozens of specialized sets of legal rules, this approach simply would create four sets of rules, tailored to the specific process for which they were written. Lawyers and clients alike would avoid the “conflict of rules” concerns that a context-specific approach would generate at the same time that they benefited from a rule-set that was tailored to the activity in which the lawyers were engaged.

Additionally, a process-enabling approach to ethics rules would truly help create the kind of environment that would produce the best possible lawyering, generating and encouraging zealous advocacy that was appropriate to the process being used by the lawyers at the time.

Finally, the process-enabling approach to legal ethics would be administrable for lawyers by the bar itself. Unlike a context-specific approach where several areas of specialization may be in-play at any one moment, the nature of mediation, arbitration, negotiation, and litigation is such that all parties can easily know in which process they are engaged and, therefore, what ethical rules should apply. Also, unlike the contract-based approach that would be enforceable only through private adjudication by the parties, a highly unlikely occurrence, a mandatory process-specific set of rules administered by a state bar association would be enforceable through public sanction and would therefore provide the necessary deterrent that a private contract might not because of the high cost of enforcement by any one attorney against another in a specific matter.

As indicated earlier in this piece, drafters of the MRPCN should craft ethical rules that create an atmosphere where cooperation and collaboration between lawyers is increased. To this end, the rules would enforce an obligation of candor and cooperation on all parties. In order to ensure that such candor was not exploited, the rules would also need to provide sanctions for results that were unfair or that failed to at least adequately meet the interests of both sides.¹¹⁴ The rules would also omit the word “material” from the current Model Rule 4.1(a) and instead forbid lawyers from making any false statement of fact or law to a third person.¹¹⁵

In addition, the rules would require that lawyers have mandatory training in negotiation theory and skills so that those who are unfamiliar with the concepts or process of integrative negotiation can have their understandings

¹¹³ See, e.g., Peppet, *supra* note 4, at 513–14 (stating that “[t]he bar is, and will likely continue to be, reluctant to promulgate and try to enforce multiple ethics codes simultaneously”).

¹¹⁴ Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1403 (1986).

¹¹⁵ See Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 589 (1975).

of negotiation updated and their skills improved. While at first glance this may seem like an onerous requirement, in fact mediation and arbitration practitioners are frequently required to participate in some kind of training as a pre-requisite to engaging in these processes.¹¹⁶ If one agrees that negotiation is also a specialized process for a specialized purpose, it is not at all inconsistent to require lawyers to participate in a similar kind of training in order to maintain a state-of-the-art understanding of this new and emerging field. In drafting the MRPCN, the drafters might also consider requiring parties to pro-actively correct others' material misunderstanding¹¹⁷ and one might also consider rules that would require lawyers to treat each other with professional courtesy and respect, avoiding difficult or hard-bargaining tactics.¹¹⁸

Proposing a MRPCN that enabled negotiators to achieve an outcome that optimized the parties' interests, was the most value-creating of many options, was based on fair norms and standards, and that identified commitments that were specific and operational, all while maintaining clear communication and building trust, means that the rules would need to provide sanctions for bluffing and puffing and sanctions for the intentional use of deceptive hard-bargaining tactics. Enforcement of these sanctions would need to be strict and names of those who violate the rules would need to be publicized and published.

X. ADDRESSING PHILOSOPHICAL/INTELLECTUAL OBJECTIONS

An important aspect of my proposal for a MRPCN is that, regardless of what the specific rules end up being, I would make the rules mandatory for all lawyers involved in negotiation. The mandatory nature of such a regime is what differentiates it from both the collaborative law approach and the contract model proposed by Peppet. Indeed, I imagine the actual substance of many of the rules in my new regime would mirror the rules found in many CLPAs. However, by simply forcing all lawyers to abide by the MRPCN that I envision, I effectively remove the ethical questions raised by those who

¹¹⁶ See, e.g., GUIDELINES FOR THE TRAINING AND CERTIFICATION OF COURT-REFERRED MEDIATORS (Jud. Council of Va. 1999), available at <http://www.courts.state.va.us/tom/tom.htm> (last visited Oct. 17, 2005); REQUIREMENTS FOR CERTIFICATION OF DIVORCE MEDIATORS (Mass. Council on Fam. Mediation), available at <http://www.mcfm.org/certreq.htm> (last visited Oct. 17, 2005).

¹¹⁷ See Loder, *supra* note 83, at 86–88 (noting that nondisclosure in the face of the opponent's serious misunderstanding is an ethical dilemma that should be examined).

¹¹⁸ Professor Kovach suggests the following elements for a reenvisioned ethical code for lawyers: ethic of care, honesty, good faith, competency, communication, empathy, altruism, and trust and respect. Kovach, *supra* note 34, at 418–29.

assert that the current MRPC are incompatible with negotiation as practiced by those who enter into collaborative law agreements. The conflict between competing behavioral norms would no longer exist, as lawyers would simply be subject to the new MRPCN when negotiating, not the MRPCL.

The decision to make these rules for negotiation mandatory, however, is likely to raise serious objections from a host of academics and practitioners alike. Some will no doubt object to my willingness to impose the problem-solving or principled idea of a good outcome on all legal negotiators.¹¹⁹ Under my regime, those who may prefer hard bargaining or beating the other side would be forbidden from the ethical practice of law. In addition, those who know little about the ability of skillful negotiators to actually do better for their client through interest-based negotiation than through positional haggling will reject the definition of a good outcome I posited earlier and continue to believe that a good outcome is nothing more than getting more for a client than the other side is able to claim for its own.

Finally, there may be some who have been exposed to interest-based or problem-solving negotiation but who, for a variety of reasons, remain unpersuaded that it produces better outcomes for clients than traditional approaches to negotiation that focus on distribution over value-creation. Others may agree that an interest-based or problem-solving approach can be helpful for transactional lawyers involved in deal-making, but is less useful in dispute contexts or in situations where the ongoing relationship is seemingly unimportant.¹²⁰ While reasonable people may differ, the overwhelming consensus of legal academics, supported largely by our brethren in the hard sciences, now agree that the state-of-the-art prescription in negotiation tends toward collaboration and a more principled approach as the best way to do well for your client and the best way to deliver on your client's interests.¹²¹ Indeed, value can be created even in dispute situations if the parties have the skill, know-how, and determination to do so.¹²²

¹¹⁹ See Peppet, *supra* note 4, at 514–18 (critiquing the dominant approach and its reliance upon what he calls the principles of nonaccountability, partisan professionalism, and regulatory uniformity). Professor Peppet points out, as does this article, that the oppressive homogeneity of the Model Rules has fallen under attack from many quarters. See, e.g., *supra* notes 39–40.

¹²⁰ See Michael L. Moffitt, *Disputes as Opportunities to Create Value*, in THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 3, at 174 (noting that those involved in a serious dispute where trust is gone are not likely to recognize opportunities for creating value with the other side).

¹²¹ The support for integrative, problem-solving bargaining is interdisciplinary in scope and has an impressive quantitative basis. See *supra* notes 66–76; see also Catherine H. Tinsley, Kathleen M. O'Connor & Brandon A. Sullivan, *Tough Guys Finish Last: The Perils of a Distributive Reputation*, 88 ORGANIZATIONAL BEHAV. & HUM. DECISION

With the vast weight of the empirical evidence in favor of a more problem-solving or collaborative mindset as the best way to deliver for clients, I am left ill-at-ease by a regime that would continue to allow lawyers to choose from a menu of ethics regimes for negotiators, some of which would sanction hard-bargaining behavior. Let me explain. Imagine that heart surgeons develop a new way to perform heart surgery, one that could be done with no incision and a hospital stay far shorter than what is required of traditional open-heart surgery. There would be a time when doctors would appropriately want to test the efficacy of this procedure. At some point, however, it would become common practice to perform surgeries using the less invasive procedure. Indeed, given the risks of traditional open-heart surgery, we would expect that the American Medical Association (AMA) would eventually require its doctors to update themselves on these latest methods and compel surgeons to use the less invasive technique. The AMA would want to ensure that all its duly accredited doctors practiced their trade using up-to-date procedures so as to produce the best possible outcome for patients. Doctors who insisted in using the outdated and higher-risk procedure would be prohibited from performing heart surgery and lose their license for failing to provide the appropriate and prevailing standard of care.

If my argument here is correct, I wonder why the American Bar Association would not be expected to ensure the same standards of practice and care for lawyers. If we have come to a point where the vast majority of those who study negotiation across a range of disciplines would prescribe collaboration and problem-solving over haggling and contention because it produces *better results for clients*, why would the legal profession continue to allow lawyers to choose an outdated, less effective approach to negotiation? Preserving a lawyer's personal autonomy or preferences is a laudable thing as a general matter. However, when the organized bar starts to preserve the personal autonomy of its members to the detriment of the profession's clients, I believe that arguments of individual lawyer "preference" or "autonomy" have been taken too far. To me, allowing lawyers to choose their ethical regime for negotiation is akin to letting doctors prescribe a remedy that is known to be medically outdated because

PROCESSES 621, 637 (2002). "Although all negotiations ultimately require value claiming skills, negotiators should be wary of developing a reputation for being a bargainer who prizes claiming value over all other goals, as this is likely to undercut profits when integrative issues are on the table." *Id.* (citation omitted).

¹²² See Michael L. Moffitt, *Disputes as Opportunities to Create Value*, in THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 3, at 173–88; see also MNOOKIN ET AL., *supra* note 59, at 119 (arguing that "[r]esolving legal disputes is not a purely distributive activity").

the doctor prefers the remedy or does not know how to prescribe any other remedy.

In his article defending the smorgasbord approach to legal ethics, Peppet argues that “the realities of moral pluralism” prevent the bar from imposing a set of ethical rules that would completely forbid all lying and that would force legal negotiators to collaborate.¹²³ For this reason, Peppet believes that those who have called for a uniform set of aspirational ethics forbidding all deception go too far. If what drives those who call for such an aspirational set of ethics is driven by moral superiority, I could not agree with Peppet more. While my own view is that the bar ought to encourage lawyer behavior that is ennobling and professionally edifying, I think it ought to respect the autonomy and individuality of lawyers to make their own decisions as to what kind of behavior is ennobling, edifying, or morally correct.

However, my argument here does not rest on morality. Instead, it rests upon an ever-growing consensus of what constitutes a “good outcome” in a particular process called negotiation. Since the overwhelming body of evidence suggests that “best practice” in negotiation yields an outcome that enlarges the overall pie, producing better results for the parties, I am entirely prepared to hold all members of the profession to the set of ethical standards that will increase the likelihood that they will achieve these outcomes. Imposing a new ethical code that forces lawyers to share information, be forthright, and be collaborative does not impose a “morality” on anyone. However, it does protect clients from lawyers who would behave using “older” or “outmoded” technologies of negotiation, those that are now substandard and not state-of-the-art.¹²⁴ Indeed, if there is one thing an organized and self-regulating professional organization should do, it is monitor and regulate the behavior of its members to ensure that their practice remains consistent with the latest technologies and the most up-to-date methods. In my view, the persistence of the bar in allowing lawyers to continue to choose hard-bargaining strategies that simply divide a fixed pie in negotiation not only confounds issues for those who seek to collaborate in negotiation by making it harder for them to distinguish collaborators from “sharks,” it also puts clients at risk of receiving substandard outcomes from lawyers who fail to stay updated on state-of-the-art practices.

Another objection to making a new set of ethical rules mandatory for lawyers is clients and their own preferences. Indeed, Peppet argues that if the bar imposed a new ethic of bargaining on lawyers that focused on

¹²³ See Peppet, *supra* note 4, at 510.

¹²⁴ See Tom Arnold, *Advocacy in Mediation*, 13 ALI-ABA 535, 542, 558 (1996) (lamenting how most lawyers have no real understanding of the technologies of negotiation from preparation to execution).

collaboration and cooperation, a set of clients who come to lawyers precisely because they are seeking a tough, gladiatorial negotiator would be forced to look elsewhere for their agents.¹²⁵ My guess is that many clients do, in fact, come to lawyers precisely because they are angry with the other party in the dispute. If they are not angry and upset, at the very least many clients retain attorneys because they would like to claim a larger share of the pie to be divided for themselves. Consequently, such clients hire the attorney precisely to serve as the aforementioned gladiator and to use tools such as bluffing, puffing, and deception.

A centrally important aspect of effective lawyering, however, involves counseling clients to help them understand more fully their interests and to work with the clients to help them best meet those interests.¹²⁶ It involves explaining to the client how a problem-solving mindset might be able to enlarge a pie worth ten “points” and, by focusing on interests and brainstorming value-creating opportunities, transform that pie into one worth twenty “points,” with distributive advantages for all parties. It is true, of course, that even the most effective lawyers will, at times, fail to persuade a client that her interests might be better served by a process that lends itself to collaboration instead of contention. In cases like this, however, litigation is likely a better process choice than negotiation.

Even so, there will still be some cases where a client insists on using negotiation, not litigation, and also insists on using deception, bluffing, puffing, and other hard-bargainer tactics. Because this is what the client prefers does not, of course, mean that the lawyer should be permitted to oblige. Again, a medical example is apropos here. Imagine a patient who comes to a doctor with serious back pain. The doctor determines that the patient needs surgery to correct a slipped disc. The patient, however, says she thinks that what she needs is acupuncture and vitamin supplements because she insists these remedies will be more effective. Despite the patient’s preferences, doctors have an ethical obligation to not prescribe remedies to patients that they do not believe are an appropriate antidote to the ailment.¹²⁷ This is what distinguishes a profession from those engaged primarily in purely for-profit business activity.¹²⁸ And, despite the increasing business

¹²⁵ Peppet, *supra* note 4, at 510.

¹²⁶ See MNOOKIN ET AL., *supra* note 59, at 179–80.

¹²⁷ See generally PRINCIPLES OF MEDICAL ETHICS (Am. Med. Ass’n), available at <http://www.ama-assn.org/ama/pub/category/2512.html> (last visited Oct. 17, 2005).

¹²⁸ For a comprehensive overview and listings of ethical codes, see Ill. Inst. of Tech. Ctr. for the Study of Ethics in the Profs., *Code of Ethics Introduction*, available at <http://ethics.iit.edu/codes/Introduction.html> (last visited Oct. 17, 2005).

realities that many lawyers face, lawyers are still professionals, not businesspeople.¹²⁹

The fact that the patient may prefer or even demand that the doctor provide acupuncture and vitamins does not create an obligation on the part of the doctor to provide these remedies. Does this result mean that the doctor may lose business to another provider, perhaps one who is not a member of the medical profession? Of course it does. In light of this sad result, however, does it mean that the medical profession should allow the doctor to prescribe a course of action other than what is indicated or appropriate in order to preserve the money flow? Of course not. Indeed, the medical profession retains its credibility by insulating its decision-making with respect to diagnosis from the whims and demands of patients. For lawyers, the same should be true. If mandatory ethical rules that require lawyers to collaborate and be candid in information exchange in negotiation result in the emergence of a new set of negotiating agents who adopt a more contentious approach to negotiation, so be it. There may even be a small percentage of lawyers who leave the legal profession in order to continue to ply their trade as hard-nosed, deceptive, and contentious bargainers. In the long run, the purging of these sharks from the legal profession will improve the reputation of the profession and will make it even easier for clients who hire lawyers to get better outcomes as a result of negotiation.

XI. ADDRESSING PRACTICAL BARRIERS

Apart from these philosophical concerns, there exist more practical barriers to my proposal of establishing four sets of ethical rules that are process-enabling.

A. The Sweeping Scope of the Proposal

Chief among these barriers is the sheer scope of the project and the enormous inertia that necessarily accompanies a professional association of the scale of the ABA. Together, they make effectuating a reform of the magnitude proposed in this article an extremely difficult task, no matter how attractive the actual proposal may be.

¹²⁹ See Chief Justice Warren E. Burger, *The Decline of Professionalism*, 63 *FORDHAM L. REV.* 949 (1995) (stating that the law is not and never has been a "business"); but see, Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 *N.Y.U. L. REV.* 1229, 1264 (1995) (making the case in favor of a shift away from professionalism and toward a business model of lawyering).

Having said this, throughout its history the bar has endeavored to re-examine its ethics code to ensure that it was meeting the current needs of the profession.¹³⁰ Most recently, the Ethics 2000 Commission was charged to do this. Even at the time the Ethics 2000 Commission met, there were some who suggested that the bar should undertake a re-examination of the basic structure of the Model Rules since they are based on the fallacy of the monolithic attorney-client relationship.¹³¹ In the end, this did not happen, however.¹³² Indeed, the failure of Ethics 2000 to address adequately the needs of those in the profession who now engage in process pluralism encouraged the continued use and development of various private ethical codes for mediators and arbitrators as well as the further growth of the collaborative law movement.¹³³ While there will inevitably be resistance to sweeping changes in the Model Rules, especially to changes that would essentially create four entirely different sets of ethical rules, my own view is that the difficulty of the task should not dissuade those who care about producing good outcomes and encouraging behavior that will foster such outcomes from working assiduously for reform in the profession.

To this end, we need to make the case more strongly that each dispute resolution process really does have a different purpose, a different idea of a good outcome, and a different set of behavioral norms or ethical guidelines. Part of this involves law faculty continuing to work with our colleagues in other disciplines in the academy to produce empirical research to share with those in the legal profession. Just as importantly, however, those who are

¹³⁰ See Krane, *supra* note 83, at 328–29.

¹³¹ Menkel-Meadow, *supra* note 22, at 84; see also Carrie Menkel-Meadow, *The Limits of Adversarial Ethics*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* 123 (Deborah L. Rhode ed., 2000) (discussing some of the differences in the ethical questions faced by lawyers in non-adversarial roles from the assumptions and ethics of those in a more traditional adversarial stance).

¹³² Menkel-Meadow, *supra* note 22, at 85 (lamenting that the ABA Ethics 2000 Commission adopted only a *de minimis* approach to deal with ethics issues in the practice of dispute resolution despite intense lobbying activity by mediators, arbitrators, and other third-party neutrals).

¹³³ See, e.g., Isaacs, *supra* note 4, at 842. Isaacs states:

The fundamental hitch in the resolution of ethical issues surrounding Collaborative Law is prevalent throughout the recent expansion of ADR approaches: without recognized authorities who possess the power to resolve the many ethical questions emerging from multi-disciplinary approaches, the practice lacks guidance and credibility. Barring the recent development of any such authority, the next best solution must come from the proactive efforts of self-governance by Collaborative Law practitioners.

Id. (internal footnotes omitted).

advocates of ADR and who understand it deeply must do a better job of publicizing stories of value-creating outcomes when lawyers collaborate with each other.¹³⁴ The combination of empirical research and powerful stories together work synergistically to persuade integrative negotiation skeptics that negotiation is a dispute resolution process that, properly practiced, can enlarge the pie and capture joint gains.

B. Triggering Ethical Rules

Earlier, I posited that one of the reasons that might explain why there are not “Model Rules” of engagement for negotiation in the way that there are for mediation, arbitration, and litigation might relate to the fact that many may still not view negotiation as a process unto itself but rather as a step along the way to litigation. In this piece, I have argued that negotiation is indeed entirely different from litigation—both in terms of its overall definition of a good outcome but also in terms of the kinds of behaviors that would be recommended or conducive in one activity over the other. At the same time, parties involved in litigation will negotiate at times. Sometimes they will attempt to settle after a complaint has been filed, sometimes after some discovery has been completed, or often, right on the courthouse steps right before trial. This kind of bargaining is a component part of litigation and is not a process entirely separate from litigation.

Under my proposal that lawyers be subject to an entirely different set of ethical rules depending on the process in which they are engaged, one challenge would be to know when negotiation ends and litigation begins. Because mediation and arbitration have been accepted as separate processes from their inception, lawyers involved in either of these two activities can easily distinguish in which process they are engaging and what rules should apply. In order for my scheme to work, lawyers must have clarity as to which process they are engaged and therefore which rules apply as between negotiation and litigation as well. This is particularly important given that the ethical rules I would propose for negotiation vary enormously from those I would propose for litigation in terms of the required levels of disclosure, truth-telling, and openness.

Any number of mechanisms might be used to trigger an end to negotiation and a beginning of litigation. For example:

- Lawyers might be presumed to be following negotiation rules in all interactions until they officially file a complaint.

¹³⁴ See Bordone et al., *supra* note 18, at 512 (arguing that popular perceptions of a field are formed more by compelling stories and vivid images than by empirical evidence).

- Lawyers might be presumed to be following negotiation process rules even after they file a complaint. The rules would shift to litigation rules once either side filed a formal document with the court, perhaps called a “Notice of Process Change.”
- Another approach would be the establishment of settlement counsel as separate and distinct from litigation counsel, a proposal already heralded by others.¹³⁵ Under this scheme, a party would hire an attorney for the negotiation process and, if this did not yield a settlement, the client would then bring in another attorney for litigation. The second attorney need not be from an entirely different firm as the first, but would need to be an entirely different individual. This scheme has the advantage of creating a clear break and also opens the way for negotiation as a specialty process in the same way that mediation and arbitration have come to be thought of as specialties. A potential downside of this triggering process, however, is that it may make some clients who know little about negotiation *ex ante* simply opt for a litigation counsel at the very beginning of their engagement or dispute in order to save the additional cost of ultimately needing to hire a litigation attorney if negotiation does not work out.

I should note that the problem of determining what process the parties are engaged in, while important, only matters for lawyers engaged in disputes. For those whose practice is transactional, the assumption that the parties are engaged in negotiation is clearer. Moreover, whether any of the solutions above are acceptable matters less than establishing the fact that, with creativity and the will, it is possible to craft a relatively simple and low-cost way of separating the process of negotiation from litigation and from the back-and-forth kind of bargaining that sometimes accompanies litigation.

C. Enforcement Issues

Enforcement of professional codes of ethics is and always has been a major challenge.¹³⁶ Enforcing the current MRPC, though already quite

¹³⁵ See William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367 (1999) (describing and making the case for the use of settlement counsel that is separate from litigation counsel); see also James E. McGuire, *Why Litigators Should Use Settlement Counsel*, 18 ALTERNATIVES TO HIGH COST LITIG. 107, 121 (2000) (explaining how the use of settlement counsel can save time and money for clients).

¹³⁶ See White, *supra* note 65, at 91 (suggesting some of the reasons why enforcement of rules concerning truthfulness is difficult, including the non-public nature

difficult to do well, is made somewhat easier by the fact that the rules set a behavioral floor or minimum standard rather than an aspiration. However, the MRPCN would require an extremely high degree of candidness, honesty, and information sharing. Because the standard will be so high, monitoring and enforcement will be both more difficult and, especially in the beginning, more important in order to create a sufficient deterrent effect.

Despite the challenge, however, enforcement is possible. We see largely effective enforcement of mandatory "truth telling" in a number of regulatory regimes from the obligations of prosecutors to make all evidence available against an accused available to the attorney of the accused¹³⁷ to various required financial submissions public companies must make on a regular basis to the Securities and Exchange Commission (SEC).¹³⁸ While there are clearly those who would endeavor to evade these requirements, the levels of compliance are extremely high and the ability of enforcement agencies to detect and discipline those who would evade such requirements is impressive and effective.

Even in areas where there may have been rampant cheating or "bad behavior," it is possible to change norms and create an ethic of order. A prominent and recent example of this includes the downloading of free music from the Internet using sites such as Napster. Just three years ago, downloading pirated music for free from such sites was commonplace.¹³⁹ Today, thanks to high-profile enforcement efforts, this behavior is rapidly being curbed as it is replaced with the legal downloading of music from sites such as iTunes and RealPlayer.¹⁴⁰ Effective, high profile enforcement

of negotiation, the ease of evading detection, and the ubiquity of negotiation as a process).

¹³⁷ See MODEL RULES OF PROF. CONDUCT R. 3.8(d) (2004) (requiring prosecutors to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused in any way); see, e.g., Casey P. McFaden, *Prosecutorial Misconduct*, 14 GEO. J. LEGAL ETHICS 1211, 1224-28 (2001) (providing a detailed explanation of judicial enforcement of the prosecutor's duty to reveal exculpatory evidence to the defense).

¹³⁸ See, e.g., Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 401 116 Stat. 745 (2002) (requiring disclosures of off-balance sheet transactions).

¹³⁹ See, e.g., *Online Music Distribution: A New Era*, in IPSOS WORLD MONITOR, Second Quarter 2003, at 24, available at <http://www.ipsos-insight.com/pdf/wm.03.12.02.pdf> (last visited Oct. 17, 2005) (reporting on data from the end of 2002 that, "[m]ost Americans participating in online music acquisition are getting their downloads for free").

¹⁴⁰ See Mary Madden & Lee Rainie, *Pew Internet & American Life Project Data Memo, Re: Music and Video Downloading Moves Beyond P2P* (Mar. 2005), available at http://www.pewinternet.org/pdfs/PIP_Filesharing_March05.pdf (last visited Oct. 17, 2005) (reporting results from a March 2005 survey that found that 43% of music

combined with a fair, easy-to-understand system for the legal distribution of music over the Internet transformed a culture in just three years. The upshot here is simple: a defeatist attitude will ensure defeat. But a concerted effort on the part of the bar to enforce a new set of ethical rules can work if those charged with the job of enforcement are committed to the task and given the resources to make it work.

There is no reason to think that the vast majority of lawyers forced to follow a new ethical code for negotiation would not comply. Moreover, one would expect that the ABA would devise an enforcement regime that would deter many from violating the rules and punish those who failed to be candid, respectful, and forthright in information exchange.

D. Lawyer's Skill Set

As lawyers have begun to engage in mediation, arbitration, problem-solving negotiation, and other ADR processes, some have asked the question of whether their skill sets, orientations, and personality are well-suited to the demands of these processes, all of which emphasize the value of creativity, listening, and collaboration over persuasive argument, analytical reasoning, and traditional advocacy practice.¹⁴¹ When it comes to personality and capacity for these processes, there is little empirical data to know how lawyers measure up against other professionals with these skills.¹⁴² Moreover, it is hard to separate fact from fiction. We do know, however, that cultural expectations and stereotypes powerfully inform and influence how individuals behave.¹⁴³ We also know that the institutional scripts for lawyers focus on adversarialism in ways that make a problem-solving or

downloaders had bought music from iTunes or BuyMusic.com, up from just 24% in 2004).

¹⁴¹ See Menkel-Meadow, *supra* note 4; Jonathan M. Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?*, 34 UCLA L. REV. 863 (1987).

¹⁴² But see Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 581 (1998) (suggesting that research on the psychological profile of law students indicates that they are more competitive, less able to empathize, and more dominant and unwilling to compromise).

¹⁴³ See MNOOKIN ET AL., *supra* note 59, at 167–71 (discussing tacit cultural assumptions about the lawyering that result in attorneys and clients adopting a zero-sum, adversarial, or hired-gun mindset).

collaborative approach to negotiation even more difficult, regardless of what skills or orientations lawyers may have.¹⁴⁴

Putting aside mere cultural or institutional norms, it may well be true that those who are drawn to law may be better at rhetoric and argument than at creativity or listening. The vast majority of lawyers, however, do have the capacity to participate in various non-adversarial processes with competence and with a high degree of skill. What they lack is appropriate training.¹⁴⁵ For many, three years of learning "how to be a lawyer" in law school, followed in some cases by many years of adversarial litigation practice, simply means that the skills of listening, collaboration, and creativity are not so much non-existent as they are under-utilized and, therefore, under-developed. However, just like a proper weight-training program can build back muscles that had long been in disuse, the same is true of a proper negotiation skills training program. Moreover, under a scheme where the MRPCN fundamentally alter the way many lawyers help parties resolve disputes, one would imagine that over time those who are drawn to the practice of law will embrace a wider range of personality types, including both those who enjoy advocacy and persuasion as well as those who enjoy collaboration and creativity.

XII. CONCLUSION

As the modern ADR movement begins its fourth decade, the idea that lawyers should be trained to diagnosis the symptoms of a dispute before prescribing an appropriate dispute resolution process that fits the parties needs is one that is taking hold in many quarters. There will soon be an entire generation of lawyers who have some exposure to a broader range of dispute resolution processes beside litigation. More and more, lawyers are learning to fit the dispute resolution forum to the fuss. At the same time, lawyers engaged in these processes have struggled with how to reconcile the ethical rules of the profession with the exigencies of the new processes.

This paper calls for a radical reform to the ethical regime of the legal profession. Arguing that ethical rules exist primarily to create behavioral norms conducive to the successful outcome of a given process, the paper posits that a different set of ethical rules should exist for each dispute resolution process. Focusing specifically on the oft-overlooked process of negotiation, the paper makes the case for a set of rules that would encourage greater disclosure between the parties, more candid communication, improved trust, and increased focus on creativity so as to create conditions that enable parties to achieve a successful outcome in negotiation.

¹⁴⁴ See MNOOKIN ET AL., *supra* note 59, at 156.

¹⁴⁵ See Arnold, *supra* note 124, at 557.

Because the effort to persuade traditional law faculties to include negotiation as a separate discipline in the law school curriculum has consumed so much energy, ADR scholars have not paid enough attention to reconciling the mismatch between what we teach our students is ideal negotiation behavior and the kind of actual behavior they find in practice. One way of dealing with this would be to teach behaviors that accept the reality of a norm of hard, distributional bargaining where those who hold their cards close to their vest claim more value. Another is to continue to teach negotiation in a problem-solving mode, as most do now, and encourage an ever-increasing grassroots movement of lawyers to contract privately using collaborative law or other market-based approaches. Given what we have learned empirically about the enormous and largely unrealized power negotiation offers attorneys to produce better, more valuable outcomes for their clients by adopting a problem-solving mindset, neither of these options seems fitting.

Instead, the bar owes it to clients and the public at-large to ensure that its members are using state-of-the-art techniques and approaches in their practice. With respect to state-of-the-art best practices for negotiation, it is clear that encouraging lawyers to share information collaboratively, listen, and seek integrative outcomes is the best way to capture joint gains. Therefore, the profession should create and adopt ethical rules for negotiators that require this behavior.

For those persuaded by the merits of interest-based negotiation as a powerful lawyering tool, the project of transforming the profession is a daunting one. Where many would use a market approach, exploiting either reputational markets or the power of contract, given the scope of the task, a process-enabling approach to legal ethics dictated by the ABA itself seems not only the most likely means of accomplishing the goal, but perhaps also the most responsible given the bar's duty as a professional accrediting association to protect the interests of the profession's clients. Fitting the ethical code and behavioral norms of lawyers to the forum being used by those lawyers will be one of the most important and valuable contributions that the second generation of ADR scholars, working with legal ethicists, can make to the successful practice of law.

